United States Circuit Court of Appeals

For the Ninth Circuit

No. 10237

THE TEXAS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING

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IN THE

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THE TEXAS COMPANY,
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vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 10,237
April 29, 1943.

PETITION FOR REHEARING

To the Honorable, The Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Petitioner, The Texas Company, respectfully requests a rehearing in the above case, on the following grounds:

1. The Court's opinion is in conflict with the recent decision of this Court in *National Labor Relations Board* v. *Citizen News Company,* No. 9995, decided April 2, 1943 (not yet officially reported).

2. In holding that the Board was within its powers in concluding that Rosen's discharges were pursuant to anti-union statements made by Petitioner's Mate Baldwin, the Court erroneously assumes that the Board concluded that Rosen's discharges were due to such statements.

3. The Court did not expressly dispose of Petitioner's Point III, namely, that the Board had improperly directed Petitioner to cease and desist from "in any other manner" interfering with, restraining, or coercng its employees.

I. As to the First Ground for Rehearing:

In its opinion in this case, the Court refers to a number of statements made by Mate Baldwin to seamen Rosen and Blasingame and concluded that: "This evidence is sufficient to warrant the Board's findings of interference, restraint and coercion".

It was contended by Petitioner that before these oral statements could be held to be an unfair labor practice there must exist something more than the statements themselves, or, in other words, evidence that the statements resulted in *acts* of interference, restraint or coercion. (See Petitioner's Reply Brief, pp. 1-4.)

In *National Labor Relations Board* v. *Citizen News Company,* No. 9995, decided by this Court on April 2, 1943, and after the argument of the case at bar, this Court held that anti-union statements *per se* did not constitute interference, restraint and coercion in view of the decision of the Supreme Court in the case of *National Labor Relations Board* v. *Virginia Electric and Power Company,* 314 U. S. 469. In so holding, this Court said:

> "The Board, at the time of its decision herein, had held in the case of the Virginia Electric and Power Company that advancement of arguments against a labor union or the expression of unfavorable opinion concerning it, or advising the employes against joining, was per se an unfair labor practice, and its above finding was evidently made on that basis.
>
> "The Supreme Court, however, in the case of N. L. R. B. v. Virginia, etc., supra, affirmed the right of an employer to freely express his opinion to his employes as one guaranteed to him by the Constitution. The Supreme Court held that the employer had a right to make statements for the express purpose of preventing the employes from joining a particular

> union so long as the employer did not threaten or take action to prevent or coerce its employes in the exercise of their rights under the National Labor Relations Act. We have in this case the same situation that was considered by the Supreme Court in the Virginia case, namely, a finding by the Board that by certain specific statements of the employer it had been guilty of coercion."

It is significant that at about the same time as this Court decided the *Citizen News Company* case the Circuit Court of Appeals for the Second Circuit reached the same conclusion in a similar case. See *National Labor Relations Board* v. *American Tube Bending Company* (C. C. A. 2nd Cir.) decided April 5, 1943, reported in 12 L. R. R. 285.

There is nothing in the record in the case at bar or in the Board's brief that in any way indicates that Baldwin's statements, quoted above by this Court, led to or resulted in acts by Petitioner that might be considered unfair labor practices. On the contrary, the Board's findings as to interference, restraint and coercion, as set forth in the Board's decision of January 24, 1940 (R. pp. 91, 94), read as follows:

> "B. Interference, restraint, and coercion.
>
> * * *
>
> "We find that the respondent, by warning its employees against organization, threatening to discharge union members, and questioning an employee about membership in the Union, has interfered with, restrained, and coerced its employees *on the S.S. California* in the exercise of the rights guaranteed in Section 7 of the Act."

It will be noted that the Board found that these statements discouraged membership in the Union *only in so far as the S.S. California was concerned* and not as to the *S.S.*

Nevada and the *S.S. Washington,* which are the only vessels involved in this proceeding. Furthermore, the Board also found that neither Rosen nor Blasingame were discharged for union activities from the *S.S. California* (R. 100). It is obvious, therefore, that the Board's findings as to "interference, restraint, and coercion" are based solely on oral statements.

Assuming, therefore, that Rosen was improperly discharged from the *S.S. Nevada* and the *S.S. Washington,* as this Court now holds, it cannot be argued that Baldwin's statements led to or resulted in such discharges since (1) he (Baldwin) was not an officer on either of such vessels, (2) the Board admits that each vessel was operated as a separate unit (R. 1766, note 16; Board's Brief, p. 9, note 9), and (3) the Board nowhere contends that such statements, which were made on the *S.S. California,* had anything to do with Rosen's discharges from the *S.S. Nevada* and the *S.S. Washington* (R. 1759-1762).

Petitioner respectfully urges, therefore, that the decision of this Court in the *Citizen News* case is indistinguishable from this case, in so far as the effect to be given the above quoted statements is concerned, and that, consequently, this Court should hold that there is no evidence to sustain the Board's general finding of interference, restraint and coercion, all of which is based entirely on oral statements.

II. As to the Second Ground for Rehearing:

The Court also held that "The Board was within its powers in concluding that these discharges were pursuant to the anti-union attitude of petitioner as shown from the testimony concerning Baldwin's statements."

In making this statement Petitioner believes that the Court is erroneously assuming that the Board did conclude that Rosen's discharges were due to Baldwin's statements.

As pointed out above, the Board did *not* so conclude. The Board merely found that such statements resulted in interference, restraint and coercion in so far as the *S.S. California* was concerned. (See the Board's "Findings of Fact", R. pp. 1759-1762.) The Board in no way, either expressly or impliedly, attributed Rosen's discharges from the *S.S. Nevada* and the *S.S. Washington* to these statements.

The very same situation is involved in the *Citizen News Company* case above referred to in which the complaint alleged interference, restraint and coercion as well as discriminatory discharges, and yet this Court refused to enforce the Board's order since it did not appear that the statements charged to the respondent resulted in or caused the discharges.

If the foregoing conclusion is correct, and Petitioner believes it is, then Petitioner respectfully requests the Court to reexamine the record respecting Rosen's discharge from the *S.S. Washington,* since, on eliminating Baldwin's statements from consideration, there is nothing to support the charge that Rosen was discharged for union activities from such vessel, other than his own testimony that he was an active union man. (See Petitioner's Brief, pp. 16-21.) The Board does not dispute this in its brief since all the testimony cited and relied on by the Board is Rosen's own. (See Board's Brief, pp. 16-20.)

The case is four square, therefore, with the *Citizen News Company* case where the Court refused to enforce a Board order based only on the employee's testimony as against the testimony of the employer that he was inefficient. As to this the Court said, in the *Citizen News Company* case, through WILBUR, J.:

> "We find no substantial evidence of discrimination in the discharge of Lugoff. Circumstances that merely raise a suspicion that an employer may be

activated by unlawful motives are not sufficiently substantial to support a finding.

"The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, *taken alone,* is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence." (Italics ours.)

In the light of this decision, it would seem that although the Board may properly have held that Rosen was discharged for union activities from the *S.S. Nevada* because of the testimony of Herman and Hart, the Board improperly concluded that Rosen was later discharged for union activities from the *S.S. Washington.*

Petitioner respectfully submits, therefore, that, at most, Rosen is not entitled to reinstatement but only to back pay from the time he was discharged from the *S.S. Nevada* to the time he was hired as a seaman on the *S.S. Washington.*

III. As to the Third Ground for Rehearing:

The Court, in its opinion, does not expressly dispose of Petitioner's assignment of error that the Board had improperly directed Petitioner to cease and desist from "in any other manner" interfering with, restraining, or coercing its employees. (Petitioner's Brief, p. 38.)

In view of the decision of the Supreme Court in *National Labor Relations Board* v. *Express Publishing Company,* 61 S. Ct. 693, Petitioner believes it is now well settled that blanket "cease and desist" provisions similar to paragraph "(b)" of the Board's order are improper.

Petitioner urges the Court, therefore, to modify the Board's order so as to strike paragraph "(b)" therefrom. Otherwise, Petitioner fears that it may be faced with contempt proceedings every time it commits an act which the

Board deems to be in violation of the Act, and be deprived of a hearing on the merits in respect to the alleged violations.

Conclusion.

For the reasons above stated, and particularly in view of the recent decision of this Court in the *Citizen News Company* case, Petitioner prays for a rehearing in this case and that, on such rehearing, the Court modify its decision in the following respects:

1. Deny enforcement of the Board's order in so far as it finds "interference, restraint and coercion" based solely on oral statements.

2. Deny enforcement of the Board's order in so far as it directs Rosen's reinstatement.

3. Modify the Board's order so as to strike paragraph "(b)" therefrom.

Dated: New York, N. Y., May 17, 1943.

The Texas Company

By James Tanham
Vice President

Albert E. Van Dusen
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New York City, N. Y.

J. A. McNair
929 So. Broadway
Los Angeles, California
Attorneys for Petitioner,
The Texas Company.

State of New York, }
County of New York, } ss.:

James Tanham, being duly sworn, deposes and says: that he is an officer, to wit, Vice President, of The Texas Company, the Petitioner named in the foregoing petition; that he has read the foregoing petition by him subscribed as such officer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein related to be alleged on information and belief, and as to those matters he believes it to be true.

James Tanham

Subscribed and sworn to before me this 17th day of May, 1943.

Leonarda C. Tymecki

[seal]

Notary Public, Queens County. Clerk's No. 3949, Register's No. 4376, N. Y. Co. Clerk's No. 450, Reg. No. 4T256.

My commission expires March 30, 1944.

Certificate of Counsel.

I, Albert E. Van Dusen, attorney of record for the Petitioner herein, hereby certify that in my opinion the foregoing Petition for Rehearing is well founded and meritorious, and that it is not interposed for purposes of delay.

Albert E. Van Dusen

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